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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ABRAND GONZALEZ,

Defendant and Appellant.

G054950

(Super. Ct. No. 14NF3911)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jonathan S. Fish, Judge. Affirmed.

Joanna Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Robin Urbanski and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Abrand Gonzalez on two counts of assault with force likely to cause great bodily injury, and the court sentenced him to an aggregate state prison term of seven years. On appeal, defendant argues that (1) during the prosecutor's rebuttal closing argument, he incorrectly described the meaning of the term "abiding conviction," thereby misstating the reasonable doubt standard and improperly reducing the prosecution's burden of proof; (2) the trial court erroneously denied defendant's post-verdict *Marsden* motion; and (3) defendant was denied due process at sentencing.[1] We reject all of defendant's contentions and affirm the judgment.

FACTS

Defendant was charged with two counts of assault with force likely to cause great bodily injury in violation of Penal Code section 245, subdivision (a)(4).[2] The information filed against him further alleged that defendant suffered two prior prison terms within the meaning of section 667.5, subdivision (b).

At trial, the prosecution presented evidence that defendant assaulted his former landlord (a five-foot one-inch woman) by repeatedly banging her head into the ground, and that he choked the landlord's 15-year-old niece during the same encounter. The incident occurred when the landlord and her niece were visiting the apartment complex for a "routine" visit. The defense attempted to show that the landlord had a motive to falsely charge defendant in retaliation for his (or his family members') previous complaints to code enforcement officials about a cockroach infestation and other problems at the apartment. The defense further attempted to show that the landlord had

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1 *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

2 All further undesignated statutory references are to the Penal Code.

grossly exaggerated her claims, as evidenced by her lack of (or relatively minimal) injuries.

The jury found defendant guilty on both counts of assault. Defendant made a post-verdict *Marsden* motion, which was heard by another judge and denied. The court then found that defendant suffered two prior prison terms within the meaning of section 667.5, subdivision (b), and it sentenced defendant to seven years in state prison, the maximum term possible under the circumstances The prison term comprised the upper term of four years on count one because the crime involved great violence and showed a high degree of callousness and viciousness, the victims were particularly vulnerable because of their small stature and the fact that they were alone at the apartment complex, defendant's prior convictions were numerous and increasing in seriousness, he had served a prior prison term, he was on probation when the crime was committed, and his prior performance on probation was unsatisfactory. The court imposed a consecutive one-year term on count two, plus one-year terms for defendant's two prior prison terms. Defendant appealed the judgment.

DISCUSSION

The Prosecutor's Argument on the Meaning of "Abiding Conviction"

Defendant's first argument on appeal concerns statements made by the prosecutor in his closing rebuttal argument regarding the meaning of the term "abiding conviction" in the explanation of reasonable doubt. According to defendant, the prosecutor misstated the meaning of reasonable doubt and thereby improperly reduced the prosecution's burden of proof, depriving defendant of due process. We disagree.

It is helpful to review the context for the prosecutor's comments at trial. At the beginning of trial and again before closing argument, the court gave the jury the following reasonable doubt instruction, which was taken verbatim from CALCRIM No.

220: "A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt. [¶] *Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true*. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt." (Italics added.) The term "abiding conviction" was not defined in the jury instructions.

In his closing argument, defense counsel addressed the meaning of reasonable doubt and in particular the meaning of the term "abiding conviction." He argued that reasonable doubt "is truth that leaves you with an abiding conviction that the charge is true. [¶] Here is where the rub begins. You're not going to be getting [a] definition in the jury instruction, which means those are open to your reasonable interpretation." Defense counsel then provided the jury with his own interpretation of "abiding conviction." "So when I look at it myself . . . I interpret that sentence to mean a lasting belief of guilt. . . . [¶] . . . [Y]ou need to have a long-lasting belief. [¶] What I mean by that is, it is not just a simple circling of a verdict form, handing it in and walking out. A profound belief that you have in guilt needs to carry on throughout the entire deliberation, and then ultimately making that final decision. Anything less is an acquittal. It is a not guilty." Defense counsel then added: "What that lasting belief means is we've heard the evidence. We don't need additional evidence. We don't need additional argument. We can make our decision, and that decision is a final decision. I walk out of here six months, six years down the road, that is my decision. The decision I made is the one that I made, it is that lasting, that powerful."

During his rebuttal argument, the prosecutor responded to defense counsel's argument by stating: "An abiding conviction is when you leave that jury room and come out here and the judge asks you if that is your true verdict. You're not asked to keep this fresh in your mind six years from now and say that was the right decision,

again, because memories fade. You won't have the same feeling of the evidence you have now after [seeing] witnesses testify. Their behavior on the stand, the way they said the words, the way—the effect on you, those will fade over time and you could second guess your decision as time goes on down the line. [¶] We're asking you an abiding conviction when you come out can you can verbalize if asked is that your true verdict, guilty or not guilty, that is all we want you to do, say is that your true verdict and that you can say yes, then your job is done."

Defendant challenges the prosecutor's argument on appeal, asserting that the prosecution misstated the meaning of reasonable doubt, reduced the prosecution's burden of proof, and deprived defendant of due process. "[W]hen a claim of prosecutorial misconduct 'focuses upon comments made by the prosecutor before the jury, the question [of the comments' prejudicial impact] is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.'" (*People v. Pierce* (2009) 172 Cal.App.4th 567, 572 (*Pierce*).) Thus, as a reviewing court, we must inquire "whether there is a reasonable likelihood that the jury misunderstood the concept of 'reasonable doubt' based on those statements." (*Ibid.*) We conclude there was no such likelihood.

We first observe that this is not a case where the court gave instructions on reasonable doubt that were in error. The instructions on reasonable doubt tracked CALCRIM No. 220 verbatim and were a correct statement of the law. (See § 1096.) In addition, the trial court properly instructed the jury on how to resolve a conflict between an attorney's argument and the court's instructions: "You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions. Pay careful attention to all of these instructions and consider them together. If I repeat any instruction or idea, do not conclude that it is more important than any other instruction or idea just because I repeated it." When considered in the context of all of

the instructions given in this case and in particular the instructions cited above, there is no reasonable likelihood the jury misconstrued or misapplied the reasonable doubt standard of proof.

Defendant's arguments in this case are very similar to those raised in *Pierce*, *supra*, 172 Cal.App.4th 567. In *Pierce*, as in the instant case, the prosecutor disputed defense counsel's explanation of an "abiding conviction" and told the jury during her rebuttal argument that the reasonable doubt instruction did not say "'anything about tomorrow, the future, next week, or even ten minutes after your verdict . . . .'" (*Pierce*, at p. 570.) The prosecutor further told the jury that "'when you're deliberating, when you've made your decision, that's when it counts. There's no legal requirement of and we'll come back in a week and make sure you're all good with this.'" (*Id*. at p. 571.)

The defendant in *Pierce* argued on appeal that the jury was "misled into thinking that the concept of 'an abiding conviction' did not require a sense of 'permanen[ce]' of a juror's belief in the truth of the charge." (*Pierce*, *supra*, 172 Cal.App.4th at p. 571.) The appellate court disagreed. (*Id*. at p. 572.) It first noted that the trial court had properly used the CALCRIM No. 220 instruction on reasonable doubt and that the meaning of the term "abiding conviction" is "self-evident" and "does not require definition." (*Id*. at pp. 572-573.) The court further observed that the prosecutor's statements were brief and that "the jury did not ask any questions concerning the instruction on reasonable doubt or the meaning of the concept of an abiding conviction." (*Id*. at p. 573.) "Thus," concluded the *Pierce* court, "there is no reasonable likelihood that the prosecutor's brief remarks led the jury to think that 'an abiding conviction' of the truth of the charge was something less than the self-evident nature of 'abiding' as 'settled and fixed' and 'lasting [and] permanent.'" (*Id*. at pp. 573-574.)

We agree with the reasoning in *Pierce*. In the present case, as in *Pierce*, the prosecutor's comments about "abiding conviction" were brief, and the jury did not ask any questions about the meaning of reasonable doubt or the term "abiding conviction."

More importantly, the jury was correctly instructed on reasonable doubt, and we must presume the jury followed that instruction. (*People v. Osband* (1996) 13 Cal.4th 622, 717 ["When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former"]; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 36-37 ["we must presume the jury followed the [reasonable doubt] instruction"].) In short, the record does not establish a reversible error.[3]

The Denial of Defendant's Marsden *Motion*

Defendant's second challenge on appeal relates to the denial of his post-verdict *Marsden* motion, which we review for abuse of discretion. (*People v. Earp* (1999) 20 Cal.4th 826, 876.) *Marsden* established the right of a defendant personally to raise the issue of ineffective assistance by means of a motion to discharge his or her attorney and appoint a new one. "[T]he decision whether to permit a defendant to discharge his appointed counsel and substitute another attorney during the trial is within the discretion of the trial court." (*Marsden, supra*, 2 Cal.3d at p. 123.) "'[A] *Marsden* hearing is not a full-blown adversarial proceeding, but an informal hearing in which the court ascertains the nature of the defendant's allegations regarding the defects in counsel's representation and decides whether the allegations have sufficient substance to warrant counsel's replacement.'" (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1320.) """A defendant is entitled to relief if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result."""" (*People v. Streeter* (2012) 54 Cal.4th 205, 230.) However, such a motion may be denied

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[3] In light of this holding, we need not address the related issues of whether defendant forfeited his claim of improper argument by failing to object, or whether any such failure to object amounted to ineffective assistance of counsel.

if the defendant, having been afforded the opportunity to speak, offers no hint of any factual grounds to support the request for new counsel. (*People v. Culton* (1979) 92 Cal.App.3d 113, 116.)

During the hearing, "the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance." (*People v. Abilez* (2007) 41 Cal.4th 472, 487-488.) The trial court here did just that. Judge Hoffer asked defendant multiple times to identify his concerns about counsel's representation, he never interrupted defendant, and he asked defense counsel to explain what he did to represent defendant, thereby satisfying the duty of inquiry. (See *People v. Silva* (2001) 25 Cal.4th 345, 366 (*Silva*); *id*. at p. 367 [finding trial court satisfied its duty of inquiry where trial court "asked defendant three times to state the grounds of his motion, never interrupted defendant's explanation, and read and considered the letter that defendant submitted"].)

Defendant nevertheless argues that Judge Hoffer failed to make an adequate inquiry into defendant's reasons for requesting substitute counsel. We disagree. As a preliminary matter, the vast majority of defendant's comments during the hearing had nothing to do with the quality of his attorney's representation and thus had no bearing on the *Marsden* motion. Indeed, defendant made only three complaints about his counsel's performance: (1) his counsel failed to object when jurors were complaining during the breaks about being bored and wishing they were assigned to the case next door; (2) his counsel failed to object when the prosecutor, in explaining assault to the jury, analogized assault to pointing a gun at someone and missing; and (3) his counsel failed to point out certain evidentiary inconsistencies to the jury.[4] Judge Hoffer elicited further information

[4] On appeal, defendant also contends that he asked Judge Hoffer to "read my reports" and that this should have triggered a duty to inquire further. However, defendant's request that the court "read [his] reports" was part of his profession of innocence; it was *not* part of any complaint about his attorney. It thus did not trigger a duty of inquiry. Defendant further argues on appeal that Judge Hoffer erred by failing to

from defense counsel on the first two points and, after some discussion, determined that neither actually warranted an objection. Defendant does not seem to challenge those findings on appeal.

Although Judge Hoffer did not inquire further about the third issue — defense counsel's alleged failure to point out certain evidentiary inconsistencies — he was not required to because defendant had not identified a "'*specific important instance*[] of alleged inadequacy of [counsel's] representation.'" (*People v. Turner*, *supra*, 7 Cal.App.4th at p. 1219, italics added.) On this third point, defendant simply told Judge Hoffer: "[I]n those two years that I was fighting my case out there, not once did a witness come forward until recently, March 7th, the man had an amputated leg. I've seen the person. *A lot of his statements and the police statements, they not match up.* [*My attorney*] *never pointed that out to them*." (Italics added.) Defendant provided no specifics about the alleged evidentiary inconsistencies and instead went on to discuss a variety of other topics. This vague and cursory allegation regarding counsel's failure to point out inconsistencies to the jury fell "well short of establishing that counsel was not providing adequate representation or had become embroiled in such an irreconcilable conflict with defendant that ineffective representation was likely to result." (*Silva*, *supra*, 25 Cal.4th at p. 367.)

Defendant contends on appeal that he "was telling the judge in the only way he knew how that there was evidence that challenged the victims' testimony of a violent assault in the form of what the responding police officer noted in his report." Given the cursory remark and the overall content of defendant's lengthy commentary, however, we cannot say that defendant came anywhere close to alerting Judge Hoffer of any such evidence. A trial court certainly has a duty to inquire "when a defendant asserts

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inquire into defendant's comment about the "cop who did the report." We see no such comment in the transcript from the *Marsden* hearing and thus will disregard this portion of defendant's argument.

'specific important instances of alleged inadequacy of [counsel's] representation' such as failure to secure potentially exonerating evidence" (*People v. Turner* (1992) 7 Cal.App.4th 1214, 1219), but no such specifics were communicated to the court here. (Compare *People v. Stewart* (1985) 171 Cal.App.3d 388, 398, disapproved on other grounds in *People v. Smith* (1993) 6 Cal.4th 684, 691-696 [trial court erred when it failed to inquire further into defendant's claim there were "two witnesses on the fourth floor who should have testified"]; *People v. Groce* (1971) 18 Cal.App.3d 292, 296-297 [trial court had duty to ask counsel for explanation after defendant "directed the court's attention to specific important instances of alleged inadequacy of his representation, i.e., the existence or nonexistence of stab wounds and other pertinent evidence that could have been established by hospital records"].)

Even if defendant's passing reference to evidentiary inconsistencies had been adequately specific, it still would not have triggered a duty of inquiry by Judge Hoffer because defendant's complaint related to the content of defense counsel's *argument*, not to evidence presented to or withheld from the jury. A defendant's disagreement with his or her defense counsel's trial strategy does not trigger any duty of inquiry in a *Marsden* hearing. (*People v. Turner*, *supra*, 7 Cal.App.4th at p. 1219 ["that a defendant disagrees with the trial preparation and strategy adopted by his appointed counsel does not trigger any duty of inquiry by the trial court"]; *People v. Penrod* (1980) 112 Cal.App.3d 738, 748 ["Appellant disagreed with the trial preparation and strategy adopted by the public defender. This does not trigger any duty of inquiry by the trial court into the attorney's state of mind"].)

Defendant additionally argues the court erred by basing its finding on effective assistance on defense counsel's performance in other cases. Although we agree a court may not deny a *Marsden* motion based *solely* on its own observations of the attorney's previous demonstrations of courtroom skill, without permitting the defendant to relate alleged instances of incompetence (*People v. Jones* (2003) 29 Cal.4th 1229,

1244), that is not what happened here. Instead, the court meaningfully considered what defendant had to say and found he had not established inadequate representation. In sum, the *Marsden* requirements were met. Applying the deferential abuse of discretion standard of review to the court's ruling, we discern no such abuse here.[5]

The Sentencing Hearing

Defendant's final argument on appeal concerns the court's imposition of the maximum sentence of seven years based on an aggravated upper term sentence. Defendant points out that the prosecution orally recommended only a midterm five-year sentence, the probation report did not recommend any sentence in particular, and the trial court did not give any indication in advance that it was considering a maximum sentence. As a result, during the sentencing hearing, defense counsel argued against the prosecutor's recommended midterm sentence but did not specifically address the propriety of a maximum sentence. Thus, contends defendant, he was denied due process because the court did not give "fair notice" of its intent to impose a maximum sentence. He further accuses the court of "sandbag[ging] the defense." We reject these arguments.

To begin with, trial courts are not required "to provide the parties with a tentative decision *before the sentencing hearing*" (*People v. Gonzalez* (2003) 31 Cal.4th 745, 752), as defendant seems to suggest. Further, defendant had fair notice he could be subject to the maximum sentence: at the very beginning of trial, the court informed

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[5] Defendant makes much of the fact that the judge who heard the *Marsden* motion, Judge Hoffer, was not the trial court judge who presided over defendant's trial, and argues Judge Hoffer, being less familiar with the case, thus had a "greater" duty of inquiry. In light of our conclusion that defendant failed to make specific important instances of allegedly inadequate representation, we need not address this contention further. For that same reason, we also decline defendant's invitation to review "the entire appellate record" for indicia that defendant "did not receive effective assistance at trial," and to reverse and remand for new trial.

defendant he could receive a maximum sentence of seven years; defendant concedes the prosecutor's oral midterm recommendation was not binding on the trial court; and defendant knew (or should have known) the upper term was possible because the probation report detailed *numerous* aggravating factors and no mitigating factors.

Although defendant was not entitled to a tentative ruling, we also do not see how a tentative ruling would have meaningfully changed defendant's arguments. Irrespective of which sentence was at issue, the relevant factors in mitigation and aggravation were and would be the same. Defendant contends on appeal that if he had known a maximum sentence was possible, his attorney would have presented argument about how defendant had "taken huge steps towards leading a law-abiding life: he had spent the last four years out of jail, had 'worked on himself,' and discharged parole." But defendant did just that during the hearing: his attorney first highlighted various inconsistencies in the evidence, and defendant then addressed the court and pointed out (among other things) that he discharged parole, voted, and "did everything by the rules, by the book."

On appeal, defendant relies primarily on *Lankford v. Idaho* (1991) 500 U.S. 110, in which the United States Supreme Court vacated a death sentence on due process grounds. In *Lankford,* the prosecutor did not seek the death penalty, and the sentencing hearing proceeded with the prosecution and defense arguing the merits of the aggravating and mitigating circumstances bearing on the length of the sentence to be imposed, which did not include factors that would be pertinent if a death sentence was at issue. (*Id.* at pp. 115-116.) The Supreme Court vacated the death sentence, finding Lankford was denied due process. (*Id.* at p. 110.) It observed that "the silent judge was the only person in the courtroom who knew that the real issue that they should have been debating was the choice between life or death" (*id.* at p. 120), and concluded that Lankford and his counsel did not have "adequate notice of the crucial issue that the judge was actually debating" (*id.* at p. 121). The Court reasoned that defense counsel would have advanced very

different arguments had she known the death penalty was at issue, but "did not make [those] arguments because they were entirely inappropriate in a discussion about the length of petitioner's possible incarceration." (*Id.* at p. 122.)

Lankford is inapposite here. As already noted, it was a death penalty case, and the lack of notice that the death penalty was an option necessarily impacted the substance of counsel's arguments. Here, by comparison, not only did defendant have notice that the upper term was possible, but as noted above, there is no indication that the alleged lack of notice meaningfully impacted defendant's arguments.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.